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NO. 84-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LINDA FLEISHMAN,

Petitioner,

vs.

ELI LILLY AND COMPANY, E.R. SQUIBB & SONS, WINTHROP LABORATORIES and THE UPJOHN COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION

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Statement of Affiliates and Subsidiaries Pursuant to Rule 28.1

The following are the subsidiaries and affiliated companies of respondent, The Upjhon Company:

Cabanas Avicolas Cobb S.A. [Argentina]; Laboratorios Upjohn S.A.I.C. [Argentina]; Asgrow Argentina, S.A.I.C. [Argentina]; Upjohn Pty. Limited [Australia]; Upjohn S.A. [Belgium]; Cobb do Brasil Agriltura e Comcercio Ltda. [Brazil]; Upjohn Produtos Farmaceuticos Ltda. [Brazil]; Asgrow do Brasil Sementes Ltda. [Brazil]; Asgrow Canada, Ltd. [Canada]; Upjohn Compania Limitada [Chile]; Compania Upjohn S.A. [Colombia]; Cobb Breeding Company, Ltd. [England]; Tuco Chemical Company Limited [England]; Upjohn Limited [England]; Laboratoires Upjohn S.A.R.L. [France]; Asgrow France, S.A. [France]; Upjohn Polymer S.A.R.L. [France]; Upjohn GmbH [Germany]; Admiral Maschinenfabrik GmbH [Germany]; Upjohn L.L.C. [Greece]; Upjohn Industrial and Commercial S.A. [Greece]; Compania Farmaceutica Upjohn S.A. [Guatemala]; P. T. Upjohn Indonesia [Indonesia]; Upjohn S.p.A. [Italy]; Japan Upjohn Limited [Japan]; Admiral Company of Japan, Ltd. [Japan]; Korea Upjhon Ltd. [Korea]; Upjohn S.A. de C.V. [Mexico]; Ceres, S.A. de C.V. [Mexico]; Asgrow Mexicana, S.A. [Mexico]; Upjohn Polymer B.V. [Netherlands]; Upjohn Company S.A. [Panama]; Upjohn Inc. [Philippines]; Upjohn Farmoquimica Ltda. [Portugal]; Upjohn (Proprietary) Limited [South Africa]; Asgrow South Africa (Pty). Ltd. [South Africa]; Laboratorios Upjohn, S.A. [Spain]; Upjohn Farmoquimica, S.A. [Spain]; Upjohn AB [Sweden]; Upjohn Polymer (Europa) AG [Switzerland]; TUCO Limited [Taiwan]; Upjohn Laboratories Ltd. [Taiwan]; Upjohn Company Limited [Thailand]; Laboratorios Upjohn C.A. [Venezuela]; Upjohn Inter-American Corporation [Mich-

igan]; Upjohn International Inc. [Michigan]; Upjohn Overseas Company [Michigan]; Upjohn Trading Corporation [Michigan]; Upjohn Holding Company [Delaware]; Asgrow International Corp. [Connecticut]; Asgrow Seed Company [Delaware]; Farmcraft Seed Co. [Delaware]; Upjohn Health Care Services, Inc. [Delaware]; Upjohn Health Care Services (U.K.) Limited [United Kingdom]; California Health Care Services, Inc. [Delaware]; Health Care Services, Upjohn Limited [Delaware]; Admiral Equipment Co. [Delaware]; Upjohn Polymer International, Inc. [Delaware]; The Upjohn Alprazolam Company [Delaware]; Upjohn Polymer Overseas Sales Corporation [Delaware]; The Upjohn Investment Company [Delaware]; The Upjohn Manufacturing Company [Delaware]; Cobb, Incorporated [Delaware]; The Upjohn Holding Company C [Delaware]; The Upjohn Holding Company M [Delaware]; The Upjohn Investment Company M [Delaware]; The Upjohn Manufacturing Company M [Delaware]; Asgrow Florida Company [Florida]; Venco Research and Breeding Farm Limited [India]; Poliolchimica S.p.A. [Italy]; Kasei Upjohn Company [Japan]; Upjohn [Nigeria] Pty. Limited [Nigeria]; ISOPOR-Companhia Portuguesa de Isocianatos, Limited [Portugal]; Admiral Espanola S.A. [Spain]; Cobb Espanalo S.A. [Spain]; Xanco Upjohn S.A. [Spain].

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BRIEF IN OPPOSITION

Preliminary Statement

Respondent, The Upjohn Company (Upjohn) respectfully prays that the petition for a writ of certiorari submitted by petitioner, Linda Fleishman, be denied in all respects. The petition sets forth no valid grounds for the grant of certiorari, as there is no basis to the constitutional challenges asserted therein.

The established decisional law of New York holds that in the case of injury allegedly resulting from exposure to a chemical substance, injury occurs and a cause of action in tort accrues on the date of exposure or inhalation, and not when the deleterious effects become apparent. (See discussion, *infra.*) Petitioner Fleishman challenges this rule, claiming that it violates her right to equal protection and due process, guaranteed by the Fourteenth Amendment of the United States Constitution. Petitioner's challenge results from the decision of the New York State Court of Appeals of June 12, 1984, affirming the decision of two lower courts which held that petitioner's claims for personal injury arising from her alleged pre-natal exposure to Diethylstilbestrol (DES) were time-barred by the applicable New York statute of limitations. Subsequently, petitioner moved in the Court of Appeals to amend the remittitur. By order dated November 15, 1984, petitioner's motion was granted and the Court of Appeals requested return of the remittitur for the following amendment:

> Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: whether plaintiff was deprived of due process and equal protection of the laws by the holding that plaintiff's causes of action accrued and the statute of limitations commenced to run upon exposure to the harmful drug. (see 62 N.Y.2d 888).

As evidenced by this amendment, implicit in the Court's affirmance of the decisions below was the determination that the New York rule fairly comports with federal constitutional requirements of equal protection and due process. Accordingly, the petition should be denied.

Statement of the Case

The petitioner herein, Linda Fleishman, commenced this action, sounding in drug products liability, in the New York Supreme Court, Queens County, by service of a summons and complaint on The Upjohn Company, in or about February 1980. In this action for personal injury allegedly the result of prenatal exposure to DES, the accusatory pleading sets forth seven (7) causes of action, sounding in negligence, breach of warranty, statutory violation, strict products liability, "concerted action leading to strict liability," and breach of a continuing duty to warn.[1] The gravamen of plaintiff's claim is:

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[1] The Petition before this Court contains a highly charged, and inappropriate, recitation of the history of DES litigation. Indeed, in footnote 1, (p. 3) of the Petition, this Court is referred to *Bichler* v. *Eli Lilly and Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625 (1st Dept. 1981), aff'd., 55 N.Y.2d 317 (1982) for a full delineation "of the facts concerning the marketing and lack of testing of DES by the companies producing the drug." In fact, in describing the result in *Bichler*, petitioner's counsel goes so far as to state that "[w]hen the drug's danger subsequently became known to them, the companies embarked on a shameful course of concealment of those dangers in an effort to keep the general public from learning of them" [*Id.*]. This is an unbecoming misuse of authority by petitioner's counsel. First, contrary to the implications of the recitation of the case, Eli Lilly and Company was the sole defendant in the *Bichler* action. Second, even cursory review of the interrogatories answered by the jury in *Bichler* reveals there was no issue of fraudulent concealment against Lilly. 55 N.Y.2d at 587, n.10. Certainly, petitioner's counsel should not have confused the breadth of that case, as his law firm represented Joyce Bichler. The Upjohn Company thus respectfully maintains that the statement of the case presented in the Petition is both inaccurate and unfair. Indeed, the bold assertions contained

(Footnote continued on following page)

> That as a result of the ingestion of the aforesaid drug [DES] by plaintiff's mother Leonor Fleishman, during her aforesaid pregnancy, plaintiff herein, Linda Fleishman, was rendered seriously, grievously and permanently injured.

The Upjohn Company served its responsive pleading on March 4, 1980. At that time, The Upjohn Company raised, *inter alia,* the affirmative defense that all claims set forth in the complaint were barred by the applicable statute of limitations.

The pertinent facts, necessary to a determination of the statute of limitations issue, were undisputed. It was conceded that plaintiff-appellant's sole exposure to the drug was as a result of maternal ingestion during pregnancy. In view of this, it was beyond dispute that any such exposure, and any sale or delivery of the product, occurred, if at all, prior to the date of plaintiff's birth, which was March 29, 1955.

Following the completion of the depositions of petitioner and her parents, The Upjohn Company moved for summary judgment, dismissing the complaint in its entirety, on the ground that all plaintiff's claims were time-barred. Thereafter, Winthrop Laboratories cross-moved for similar re-

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(Footnote continued from preceding page)

therein, such as the sweeping conclusion that "most of these injured women in New York have found the door to the courthouse slammed shut before them, as they try to seek legal redress for their injuries" (Petition, p. 4) find absolutely no support in the record of the preceding courts and are inserted for pure theatrical effect. While Upjohn disavows and disputes the petitioner's statement of the case, it shall not indulge in a point by point refutation of its inaccuracies, for such is unnecessary to rebut the specious constitutional challenge raised therein.

lief. Additionally, Eli Lilly and Company and E. R. Squibb & Sons cross-moved to dismiss the complaint on the same ground.

Upjohn's motion was predicated on the position that, pursuant to an unbroken line of New York authority, any and all claims of plaintiff, Linda Fleishman, accrued no later than the date of her birth, that being March 29, 1955. Upjohn contended that all claims were governed by the three (3) year period delineated in New York Civil Practice Law and Rules §214(5), and that the proper application of the infancy toll dictated that Linda Fleishman reached majority, and the statute of limitations on her claims began to run on September 1, 1974. Accordingly, all claims were time-barred on September 1, 1977, two and one-half (2½) years prior to her initiation of the suit against The Upjohn Company.

The Appellate Division, Second Department, affirmed the order of the court below, without opinion, citing its decision in *Manno* v. *Levy,* 94 A.D.2d 556, 465 N.Y.S.2d 219 (2d Dept. 1983), which had recognized the controlling case in New York of *Thornton* v. *Roosevelt Hospital,* 47 N.Y.2d 780 (1979) [2] Justice Gibbons dissented, distinguishing this

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[2] In *Manno,* the female plaintiff contended that she allegedly developed breast cancer in the late 1970's as the result of her ingestion of DES, taken during her pregnancy in 1969. The Appellate Division affirmed the lower court's determination that the claims asserted by plaintiff Manno were time-barred, holding the date of accrual rule, established in the long line of New York cases, including *Thornton* v. *Roosevelt Hospital,* 47 N.Y.2d 780 (1979), was conclusive on the issue of the timeliness of plaintiff's claims. The *Manno* action was appealed to the New York State Court of Appeals, and argued on the same date as the case at bar. The *Manno* decision was similarly upheld by the New York State Court of Appeals. As in the case at bar, the Court of Appeals granted plaintiff's motion to amend the remittitur and, upon information and belief, plaintiff will seek a writ of certiorari to this Court.

case on the unsound premise urged by plaintiff—that, in the case at bar, the date of ingestion/exposure rule is not controlling, because this plaintiff had not ingested the product in issue, but rather was exposed to it as a result of maternal ingestion.

As noted, *supra,* the New York State Court of Appeals affirmed the order of the Appellate Division, without opinion. Chief Judge Cooke dissented. Upon seeking and obtaining an appropriate remittitur, the petitioner now seeks review by this Court.

Reasons for Denying the Writ

Petitioner's main challenge to the decision of the New York Courts rests essentially on the issue of the time of accrual of her cause of action (Petition, pp. 4, 6). Under New York law, however, injury occurs upon exposure to chemical compounds and not when deleterious effects become apparent.[3] *Steinhardt* v. *Johns-Manville Corp.,* 54 N.Y.2d 1008 (1981) *cert. denied and appeal dismissed sub nom, Rosenberg* v. *Johns-Manville Sales Corp.,* 456 U.S. 967 (1982); *Thornton* v. *Roosevelt Hospital,* 47 N.Y.2d 780 (1979); *Schwartz* v. *Heyden Newport Chemical Corp.,* 12 N.Y.2d 212 *remittitur amended,* 12 N.Y.2d 1073, *cert. denied,* 374 U.S. 808 (1963); *Schmidt* v. *Merchants Despatch Transp. Co.,* 270 N.Y. 287 (1936).

Contrary to the established law of the State of New York, petitioner Fleishman contends that her injury occurred only when she became cognizant of her damage. It

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[3] The only statutory exception to this rule is a claim for personal injuries arising from exposure to "Agent Orange." *See,* N.Y. Civ. Prac. Law §214(b). (McKinney 1981).

is alleged that New York's date of accrual rule in the instance where personal injuries allegedly result from exposure to chemical compounds serves to deprive petitioner Fleishman of her day in court.

Thus, by this application, the petitioner seeks nothing less than to have this Court invalidate, on constitutional grounds, the established law of New York State. However, careful analysis of petitioner's position reveals that she does not mount a sound constitutional challenge; rather, petitioner merely argues that the policy decisions made by other states, or jurisdictions, as enunciated in their controlling statutes, are more sound, or preferable. Hence, petitioner spends a goodly portion of her submission discussing the law of other jurisdictions. (See Petition, pp. 8-11.) Indeed, petitioner's counsel goes so far as to state that "[r]ather than following such authorities [discovery rule jurisdictions], however, the New York courts have continued to adhere to a doctrine expressed in such cases as *Thornton* v. *Roosevelt Hospital,* 47 N.Y.2d 780, 417 N.Y.S.2d 920 (1979) . . . ." (Petition, p. 11.) In so doing, petitioner's counsel has clearly missed the point. The issue is not whether, in this Court's judgment, New York's rule is preferable to, or less desirable than, the statutes of limitations rules of other jurisdictions. Rather, the inquiry is whether the New York rule survives constitutional scrutiny by virtue of the fact that it legitimately, reasonably and rationally serves the rightful interests of this state.

The Upjohn Company respectfully maintains that the New York rule applicable to petitioner's claims is a valid exercise of state policy, which is premised upon an eminently rational basis and which is reasonably related to the furtherance of the state's goals, as enunciated by its courts. Accordingly, petitioner's constitutional challenge must fail.

A. The application of the statute of limitations, so as to bar petitioner's claim for personal injuries, does not impermissibly deny Linda Fleishman's right to equal protection or due process guaranteed under the Fourteenth Amendment of the United States Constitution.

Petitioner contends that New York State's date of exposure rule violates the equal protection and due process guarantees of the Fourteenth Amendment. A proper analysis of these guarantees, however, reveals that this two-pronged attack on the law of New York is without merit.

(1) New York's rule of accrual does not violate equal protection guarantees.

Turning first to petitioner's claim of abrogation of her rights of equal protection, it is alleged that the New York rule impermissibly serves to select a certain class of plaintiffs as those who shall lose their rights (Petition, p. 17). Petitioner contends that:

> Any decision or statute which singles out one class of persons for either special burdens or special privileges denies equal protection of the laws to which all are entitled . . . . (Petition, p. 16).

Application of an appropriate equal protection analysis, however, clearly demonstrates that petitioner's claim of constitutional violation is wholly specious.

The rule at issue presents no question of deprivation of rights based on race, religion or national origin. Hence, there is no suspect classification at issue. *See, Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964). Moreover, contrary to petitioner's claims, the bar of the statute of limitations does not im-

pinge upon a fundamental right, i.e., those specifically guaranteed by the Constitution. See, e.g., *Zablocki* v. *Redhail,* 434 U.S. 374 (1978); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973); *Roe* v. *Wade,* 410 U.S. 113 (1973). Hence, petitioner's claims of constitutional violation are not to be examined under strict scrutiny.[4] The heightened level of scrutiny enunciated by this Court in *Craig* v. *Boren,* 429 U.S. 190 (1976) (gender based classifications) and *Trimble* v. *Gordon,* 430 U.S. 762 (1977) (classification based on legitimacy) is similarly inapplicable. Rather, the New York rule challenged in this case is subject to the rational basis test. Under this analysis, petitioner's argument that New York's rule impermissibly distinguishes between plaintiffs would have merit only if the reason for the distinction were so wholly unrelated to the rule's legitimate purpose as to make its provisions irrational, *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979); *Ornstein* v. *Regan,* 604 F.2d 212, 214 (2d Cir. 1979), or if the reason for the distinction were wholly irrelevant to the state's objective. *McGowan* v. *Maryland,* 366 U.S. 420, 425 (1961). Case law illustrates that the rationality of the rule is manifest.

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[4] The cases cited by petitioner to support her claim of a federal constitutional right of access to the courts are simply inapposite. In *Bounds* v. *Smith,* 430 U.S. 817, 822 (1977), the Court reenunciated its prior holding that prisoners have a constitutional right of effective access to the courts. *Hilliard* v. *Scully,* 537 F.Supp. 1084 (S.D.N.Y. 1982), similarly involved the rights of a prisoner. In *Spock* v. *United States,* 464 F.Supp. 510 (S.D.N.Y. 1978), the court examined and weighed a plaintiff's right of privacy against the government's claim of privilege and found that the plaintiff's rights in that case outweighed the government's interests. Significantly, the *Spock* court permitted the plaintiff to maintain his action finding that it would be consistent with the state's goals and purposes. *See,* 464 F.Supp. at 516.

In *Ornstein* v. *Regan, supra,* a former employee of the Board of Education brought a civil rights suit alleging that a two (2) year filing requirement for disability retirement was unconstitutional. Plaintiff argued that the two (2) year period should run, not from the date of the accident, but from the date he discovered that his disability was permanent. In rejecting his equal protection argument, the Second Circuit held:

> There can be no question . . . that the Board has a strong and legitimate interest in being able to investigate claims before they become stale. It can insure its ability to do this by insisting that every claim be filed within two years of the accident giving rise to the claim. Rule 17, which applies in the same manner to all members of the Retirement System, does not deny appellant equal protection. (citations omitted). *Id.* at 215.

Similarly, with respect to claims for personal injury allegedly resulting from deleterious effects of chemical compounds, the courts of New York have a legitimate interest in hearing claims before they become stale. New York's rule of accrual in cases involving chemical compounds clearly and unequivocally meets the test of rationality. It provides a reasonable method of insuring that claims are litigated before they reach unacceptable antiquity. It recognizes that the passage of time has unalterable, and detrimental, effects on litigation. Indeed, there is implicit recognition in New York's rule that when one compels a defendant to litigate a claim that has its genesis in an event which occurred decades before, the possibility of feigned claims is real and there is a possible break in causation between the alleged breach of duty and the alleged injury. This can be gleaned from the fact that New York's discovery accruals, such as the foreign object doctrine,

which represent exceptions to the general rule, were promulgated only in the face of circumstances which militate against such dangers. *Martin* v. *Edwards Laboratories*, 60 N.Y.2d 417 (1983). The rule, then, represents a salutary, reasonable, and rational policy decision that there comes a time when a claim cannot be properly, or fairly litigated. Moreover, the rule applies in a similar manner to all plaintiffs in drug-related personal injury actions. These two factors coalesce so as to insure that there is no denial of equal protection.

The legitimacy of New York's "date of accrual rule" in chemical compound cases was addressed most recently by the New York Court of Appeals in the case of *Martin* v. *Edwards Laboratories, supra.* The *Martin* action explored the question of the appropriate date of accrual of a cause of action for personal injuries allegedly caused by the breakdown of an artificial heart valve which had been implanted in plaintiff's decedent. The *Martin* court determined that in cases involving injury arising from products which are *not* assimilated into the body, and which are intended to perform a continuing function, (i.e.—products other than chemical compounds), injury occurs and a cause of action accrues when the product malfunctions. In such cases, the policy commands the result: the possibility of feigned claims, difficulty in proof or a break in causation is not present in such cases (as it is in inhalation/ingestion cases), because in those cases the product alleged to have malfunctioned can be examined and a determination as to breakdown can be made. Thus, the court concluded, the age of the claim is no greater a disadvantage to the manufacturer than it is to the claimant.

The same cannot be said of chemical compounds which are assimilated by the body, such as DES. In such cases, the date of exposure rule is a valid enunciation of a policy

intended to guard against the litigation of truly stale claims, which involve remote judgments and questions, and in which the issue of causation is always tainted by the passage of time. These are the judgments of policy which underlie the statute of limitations and justify the rule of accrual despite the fact that, in a few instances, it may operate harshly.

In *Martin,* the Court of Appeals noted that:

> [w]hen limitations begin to run 'depends on a nice balancing of policy considerations' [citations omitted] reflecting the manufacturer's interest in defending a claim before his ability to do so has deteriorated through passage of time, on the one hand, and, on the other, the injured person's interest in not being deprived of his claim before he has had a reasonable chance to assert it. (citations omitted)

Id. at 425. The New York date of accrual rule is predicated upon the salutary policy against compelling a defendant to defend against stale claims, where memories have faded, documentation is lost, the possibility of feigned claims is real and there is a possible break in causation between the alleged breach of duty and the injury. The challenge raised by petitioner, that no basis exists to distinguish between the manufacturer of chemical compounds and the manufacturers of other products has been considered and rightfully rejected by the Court of Appeals on the basis of this sound policy. Thus, New York's accrual rule is a legitimate and reasonable expression of the state's interest and does not deprive petitioner of equal protection of the law.

(2) New York's rule does not violate due process.

For the same reasons, petitioner's due process argument also fails to demonstrate a violation of her constitutional rights. Certainly, a state is empowered to enact an appropriate statute of limitations so as to enforce its public policy. Such an exercise necessarily entails a weighing of conflicting interests and any such balancing, which is not arbitrary or capricious, is not subject to constitutional attack on due process grounds:

> Statutes of limitation have been part of the law of every civilized nation from time immemorial. Since each sovereignty may organize its judicial tribunals according to its own notions of policy, it has been recognized since the early days of this republic that statutes of limitations are within the sovereign power of each state to enact [citation omitted]. Such statutes, having the effect of denying any judicial remedy for the enforcement of an otherwise valid claim, are justified on grounds of policy and as statutes of repose 'designed to protect the citizens from stale and vexatious claims and to make an end to the possibility of litigation after the lapse of a reasonable time.' *Guaranty Trust Co. of New York* v. *United States,* 304 U.S. 126, 82 L.Ed. 1224, 58 S. Ct. 785 (1937). The legislative body, in enacting such legislation, may weigh the conflicting interests between one person's right to enforce an otherwise valid claim and another person's right to be confronted with any claim against him before the lapse of time has likely rendered unavailable or difficult the matter of obtaining or presenting proof. *Any balance of these conflicting interests which is not arbitrary or capricious is within the legislative authority and not subject to constitutional attack for*

> *lack of due process. Hargraves* v. *Brackett Stripping Mach. Co.*, 317 F.Supp. 676, 682-83 (E.D. Tenn. 1970). (emphasis added).

Thus, the test of due process applicable to the statute of limitations is one of reasonableness. If the selection of the date of last ingestion of a drug as the accrual date of a cause of action for personal injury is not arbitrary, no constitutional attack can lie. Given the fact that every personal injury action involves proof which must include evidence of a breach of duty, a wrongful act or a defect in a product, the effect of a lapse of time on the availability of such proof is of reasonable concern in fashioning a just rule of accrual for statute of limitations purposes. The courts of New York, in the legitimate and reasonable exercise of their judicial authority, have determined that the public policy embraced by the statute of limitations (protection against stale claims) is best served by the rule that a cause of action accrues at the time of last exposure to, or ingestion of, a chemical compound. This is a rightful expression of policy which cannot be undermined by the singular instance of a plaintiff who claims hardship from the application of the rule. As stated by the court in *Orenstein* v. *Regan, supra*:

> Limitation periods are designed to eliminate stale claims (citations omitted). 'They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable [sic] and the unavoidable delay.' [citations omitted]. They sometimes expire before a claimant has sustained any injury . . . or before he knows that he has sustained an injury . . . . If the limitation period is otherwise reasonable, a claimant is not thus deprived of his right to due process. (citations omitted).
>
> *Id.* at 214.

Accordingly, petitioner's assertions that the operation of New York's "date of ingestion" rule operates to bar her particular action does not supply a basis for a claim of violation of due process or equal protection. Where a state provision does not violate a fundamental right, it is the burden of the challenger to establish the irrationality of the restriction. *Seoane* v. *Ortho Pharmaceuticals,* 660 F. 2d 146 (5th Cir. 1981). Petitioner has not, and cannot, refute the reasonableness of the underlying rule and the policy expressed therein.

Statutes of limitations have aptly been described as statutes of repose. They reflect the balancing of factors, resulting in a determination that after a reasonable span of time, a defendant should not be required to defend a suit where "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.,* 321 U.S. 342, 349 (1944). Recognizing the state's legitimate interest in this end, the New York courts have noted:

> [O]ur duty is to give [the] statute [of limitations] its intended effect as a statute of repose—designed 'to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared and evidence has been lost.' The statute * * * which is controlling here is a declaration of public policy governing the right to litigate; it came into our law by way of the Legislature, not through the judicial process.

Gregoire v. *G. P. Putnam's Sons,* 298 N.Y. 119, 125 (1948) (citations omitted). This expression of state policy is rationally related to valid governmental goals and thus cannot be attacked as constitutionally infirm. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

B. Having failed to meet her burden, the petition for a writ of certiorari should be denied.

On this petition, Linda Fleishman seeks no less than to have this Court substitute its own judgment for that of the State of New York as enunciated by its highest court. It is respectfully submitted that this is an impermissible exercise of the power of this Court, as the New York rule is an expression of valid state interest.

It is most respectfully submitted that if the date of accrual rule in New York is to be changed, that is the proper realm of the New York State Legislature, and not of this tribunal. Historically, in those instances where the State Legislature has determined that a change in policy is warranted, it has acted to make the changes it deemed necessary—e.g., as in cases of personal injury allegedly attributable to exposure to "Agent Orange." See, *supra,* at p. 6 n.3. It must, thus, be presumed from the New York Legislature's reluctance to enact a "discovery rule" in chemical compound cases, that the Legislature has determined that such a change in the law will not further the interests of the people of the State of New York. In light of this fact, petitioner's reliance on decisions interpreting federal issues (e.g., *Urie* v. *Thompson,* 337 U.S. 163 (1949) (deciding issues under the Federal Employers' Liability Act) and the holding of the courts of those states which have recognized a discovery rule (e.g., Arizona, Arkansas, California) is inapposite and has no bearing on the unquestionable constitutionality of the New York rule.

CONCLUSION

For the foregoing reasons, petitioner's request for the grant of a writ of certiorari should be denied.

Respectfully submitted,

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